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April 26, 2007

No. 06-8273

In the
SUPREME COURT OF THE UNITED STATES

Stephen Danforth, *Petitioner,*

v.

State of Minnesota, *Respondent.*

On Petition for a Writ of Certiorari to the
Supreme Court of the State of Minnesota

SUPPLEMENTAL REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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SUPPLEMENTAL REPLY BRIEF IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

Petitioner Steven Danforth respectfully submits the following supplemental reply brief in support of the petition for writ of certiorari.

Respondent State of Minnesota proposes that the following is true: the courts of the sovereign state of Minnesota may not, under any circumstances, apply the holding of *Crawford v. Washington*, 541 U.S. 296 (2004), to any case that was "final" before *Crawford* was decided because the Federal District Court for the District of Minnesota could not grant such defendants relief under *Crawford* via a federal habeas corpus petition.[1] In other words, respondent agrees with the Minnesota Supreme Court's holding that once the federal habeas corpus avenue of relief has closed, the sovereign states are powerless to allow collateral attacks upon criminal convictions based upon new rules of federal constitutional law. Because this Court's precedents do not compel any such radical conclusion, because of the split of lower-court authority on the issue, and because of the importance thereof, petitioner respectfully requests that this Court grant the petition for writ of certiorari.

1. This Court has not decided whether states are forced, via the Supremacy Clause or any other mechanism, to use the retroactivity standard announced in *Teague*.

Respondent begins it supplemental brief in opposition (S-BIO) by claiming that,

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[1] *See Wharton v. Bockting*, 127 S.Ct. 1173, 1183-84 (2007) (holding that *Crawford* does not apply to cases pending on federal habeas corpus review). In light of *Bockting*, petitioner withdraws the second question presented in the original petition for writ of habeas corpus.

essentially, this Court has answered the question presented and has already held that state courts must apply the *Teague*[2] standard, and the *Teague* standard only, to determine the retroactive effect of a United States Supreme Court decision. (S-BIO at 2-6). Respondent is wrong.

There is a wide split of lower-court authority on this question. The majority of state courts which had considered this issue have squarely held that "*Teague* does not govern a state court's decision to grant retroactive application of a new [federal] constitutional rule in state post-conviction proceedings – that, instead, *Teague* binds only federal courts in federal habeas corpus proceedings." *Smart v. State*, 146 P.3d 15, 25 (Alaska Ct. App. 2006); (citing *People v. Bradbury*, 68 P.3d 494, 498 (Colo. App. 2002); *Johnson v. State*, 904 So.2d 400, 408-09 (Fla. 2005); *Figarola v. State*, 841 So.2d 576, 577 n. 1 (Fla. App. 2003); *People v. Flowers*, 561 N.E.2d 674, 682 (Ill. 1990); *State v. Mohler*, 694 N.E.2d 1129, 1132 (Ind.1998); *Brewer v. State*, 444 N.W.2d 77, 81 (Iowa 1989); *State ex rel. Taylor v. Whitley*, 606 So.2d 1292, 1296 (La. 1992); *State v. Whitfield*, 107 S.W.3d 253, 267 (Mo. 2003); *Colwell v. State*, 59 P.3d 463, 470-71 & n. 41 (Nv. 2002); *State v. Lark*, 567 A.2d 197, 203 (N.J. 1989); *State v. Evans*, 114 P.3d 627, 633 (Wash. 2005) (parenthetical descriptions of holdings and quotes omitted)). A minority of states, including Minnesota in the case at bar, have disagreed. *See Danforth v. State*, 718 N.W.2d 451, 455 (Minn. 2006); *State v. Egelhoff*, 900 P.2d 260, 267 (Mont.

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[2] *Teague v. Lane*, 489 U.S. 288 (1989).

1995); *Page v. Palmateer*, 84 P.3d 133, 136-38 (Or. 2004).[3]

If the question presented was as settled as respondent claims it to be, it is hard to imagine that courts in so many states would have gotten the law so wrong. The fact that reasonable jurists in no fewer than 15 states have reached opposite conclusions on a question of federal law[4] is reason enough for this Court to grant the petition for writ of certiorari in this case.

Respondent relies heavily upon three cases – *American Trucking Ass'n v. Smith*, *Michigan v. Payne*, and *Harper v. Virginia Dept. of Taxation* – to support its claim that the Minnesota Supreme Court's decision was correct. (S-BIO at 2). None of those cases even touch upon, let alone answer, the question presented here.

In *American Trucking Ass'n v. Smith*, 496 U.S. 167 (1990), this Court considered

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[3] Still others have simply "assumed, apparently without examining the issue, that *Teague* controls state litigation as well as federal habeas corpus litigation." *Smart*, 146 P.3d at 25 (citing *Johnson v. Warden*, 591 A.2d 407, 410 (Conn. 1991); *Whisler v. State*, 36 P.3d 290, 296 (Kan. 2001); *People v. Eastman*, 85 N.Y.2d 265, 624 N.Y.S.2d 83, 88-89, 648 N.E.2d 459, 464-65 (1995); *Agee v. Russell*, 751 N.E.2d 1043, 1046-47 (Oh. 2001); *Thomas v. State*, 888 P.2d 522, 527 (Okla. Crim. App.1994); *Commonwealth v. Hughes*, 865 A.2d 761, 780 (Pa. 2004); *State v. Gómez*, 163 S.W.3d 632, 650-51 (Tenn. 2005), *vacated on other grounds by* 127 S.Ct. 1209 (U.S. Feb. 20, 2007); *Taylor v. State*, 10 S.W.3d 673, 679 (Tex. Crim. App. 2000)).

[4] The question presented – whether state courts are permitted to apply this Court's decisions to a broader class of defendants than those eligible in federal habeas corpus proceedings – is undeniably one of federal law. *See American Trucking Ass'n v. Smith*, 496 U.S. 167, 177 (1990) (quoting *Chapman v. California*, 386 U.S. 18, 21 (1967)). *See also Id.* at 211 n. 4. Respondent chides petitioner for not asking the Minnesota Supreme Court to "adopt" *Crawford* as a matter of state law and then seek retroactive application of that state-law rule. (S-BIO at 6). Had petitioner done as much, the case would present only a question of state law. This case presents an issue of federal law that is one of first impression. This Court should grant the petition to answer it.

whether the Arkansas Supreme Court had erroneously applied Supreme Court precedents on the retroactive application of civil decisions. *American Trucking*, 496 U.S. at 178. The Court held that federal law on the retroactive effect of civil decisions controlled and that the lower courts had erred in interpreting that law. *Id.* at 200. The Court reversed and remanded for further proceedings. *Id.* But the Court made clear that Arkansas, and other states similarly affected, were not prevented from providing civil litigants more protections than the federal courts offered. *See McKesson Corp. v. Division of Alcoholic Beverages and Tobacco, Dept. of Business Relations of Fla.*, 496 U.S. 18, 52 n. 36 (1990) (holding that "[t]he State is free, of course, to provide broader relief as a matter of state law than is required by the federal constitution"); *American Trucking*, 496 U.S. at 200 (remanding for state court to afford relief "not inconsistent with" *McKesson*). *See also American Trucking*, 496 U.S. at 178-79 (describing *McKesson* as holding that "federal law sets certain minimum requirements that States must meet but may exceed in provided appropriate relief") (emphasis added); *Id.* at 210-11 (Stevens, J., dissenting) (contending that federal constitutional "does not ordinarily limit the State's power to give a decision remedial effect greater than that which a federal court would provide") (citations omitted).

As the Alaska Court of Appeals explained:

> * * * *American Trucking* merely says that, under the supremacy clause, state courts must follow any rule of retroactivity imposed on them by the Supreme Court. The underlying question that remains to be addressed – the question that *American Trucking* does not answer – is whether the Supreme Court intended the *Teague* retroactivity test to be binding on the states.

Smart, 146 P.3d at 23. Furthermore, *American Trucking* does not answer the question presented here because it does not involve a state court's attempt to grant to a criminal defendant broader rights than the federal constitution or the federal courts would authorize.

Michigan v. Payne, 412 U.S. 47 (1973), is even less apposite. In *Payne*, the Michigan Supreme Court afforded sentencing relief to a defendant by applying retroactively this Court's decision in *North Carolina v. Pearce*, 395 U.S. 711, 723-26 (1969). *Payne*, 412 U.S. at 48-49. The Michigan court, however, expressly tied its decision to further action by this Court, writing that it was only applying *Pearce* "pending clarification" of the retroactive effect of *Pearce* by this Court. *Payne*, 412 U.S. at 49 (citation omitted). This Court granted certiorari and held that, as a matter of federal law, *Pearce* did not apply retroactively. *Id.* The Michigan Supreme Court did not hold that it could not afford Payne any relief if *Pearce* did not apply retroactively under federal law; it simply held that it would not do so. *Payne*, 412 U.S. at 49.

That is the difference between *Payne* and the instant case. Here, the Minnesota Supreme Court stated unequivocally that it was prohibited from applying any test other than *Teague* to petitioner's claim; if petitioner was not entitled to relief under *Teague*, the Minnesota court held, than he could not be entitled to relief under state law either. *Danforth*, 718 N.W.2d at 456-57. The question presented here is whether the Minnesota Supreme Court was correct and *Payne* does not address, much less answer, that question.

Finally, *Harper* stands for the unremarkable proposition that states must grant at least as much protections to their citizens as those citizens would receive in federal court.

Harper v. Virginia Dept. of Taxation, 509 U.S. 86, 97 (1993). *Harper* is essentially the *Griffith v. Kentucky*, 479 U.S. 314 (1987), of civil litigation; in it, this Court held that "when [the Court] applies a [new] rule of federal law to the parties before it, that rule * * * must be given full retroactive effect in all cases still open on direct review." *Harper*, 509 U.S. at 97. But *Harper* does not touch upon, let alone decide, the states' authority to grant more protection to an individual litigant than that litigant would be afforded in federal court. The question here is not whether Minnesota must afford petitioner all of the protections affordable to him under federal law, the question is whether Minnesota is permitted to afford petitioner greater protections than those available in federal court. Like *Payne* and *American Trucking*, *Harper* does not touch upon that question.

This Court has not answered the question presented in this case. It should grant the petition for writ of certiorari to do so.

2. Respondent is wrong on the merits – *Teague* does not apply to or bind the state courts.

Turning to the merits, respondent claims, without citation, that "*Teague* is not limited to federal habeas cases." (S-BIO at 3). Respondent is wrong. The purpose of the *Teague* standard was to limit federal courts' ability to review a state criminal conviction on federal habeas review.

> Habeas corpus always has been a collateral remedy [that] provid[es] an avenue for [overturning] judgments that have become otherwise final. It is not designed as a substitute for direct review [of a criminal conviction]. [Because of this, the] interest in leaving [the underlying] litigation in a state of repose, ... not subject to further judicial revision, may quite legitimately be found ... to outweigh[,] in ... most instances[,] the competing interest in readjudicating [criminal] convictions according to all [of the] legal standards in effect when a habeas petition is filed.

> [Rather,] it is sounder, in adjudicating habeas petitions, generally to apply the law prevailing at the time [the defendant's] conviction became final....

Teague, 489 U.S. at 305-06 (quoting *Mackey v. United States*, 401 U.S. 667, 682-83 (1971) (Harlan, J., concurring in part and dissenting in part)). According to the *Teague* plurality, habeas corpus was not intended "to assure that an individual accused of a crime is afforded a trial free of constitutional error." *Id.* at 308. Rather, "interests of [federal-state] comity and finality [of criminal judgments] must also be considered in determining the proper scope of habeas review." *Id.* Finally, in emphasizing the important comity and context principles at play in *Teague*, the Court concluded that "[s]tate courts are understandably frustrated when they faithfully apply existing constitutional law only to have a federal court discover, during a [habeas] proceeding, new constitutional commands." *Id.* at 310 (quoting *Engle v. Isaac*, 456 U.S. 107, 128 n. 33 (1982)).[5]

None of these comity concerns apply to state courts reviewing state-court criminal convictions, nor is there any indication that this Court intended to indicate that they did. Put simply, "*Teague* does not address the authority of state courts; rather, *Teague* restricts the authority of federal courts to overturn state criminal convictions." *Smart*, 146 P.2d at 23. As the South Dakota Supreme Court stated:

> The *Teague* decision ... arose in the context of interpreting federal habeas corpus law, a right granted through federal statutes.... The various states, including South Dakota, have created state rights of habeas corpus through statutes.... Each sovereign has the right to decide how it will allow access to this extraordinary remedy. The federal government controls how it permits access to the remedy in its courts, and South Dakota establishes grounds that will provide access to habeas corpus in our courts.

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[5] *See Smart*, 146 P.3d at 21-22, for a detailed discussion of the purposes of *Teague*.

Cowell v. Leapley, 458 N.W.2d 514, 517 (S.D. 1990) (emphasis added); *see also Collins v. Youngblood*, 497 U.S. 37, 41 (1990) (noting that *Teague* was "grounded in important considerations of federal-state relations").

Just as the Minnesota state courts would have no business instructing the federal courts on how to interpret the federal habeas corpus statute, the federal courts have no business dictating to the Minnesota state courts how it should interpret and apply Minnesota's Post-Conviction Relief Act, Minn. Stat. § 590.01, *et seq.* (2004). Under that law, any person who claims that his conviction was obtained in a manner that "violated the person's rights under the Constitution or laws of the United States or of the state [of Minnesota]" may petition the district court for relief. Minn. Stat. § 590.01, subd. 1 (2004). When considering such a petition, the statute affords the district court broad remedial powers; it may "vacate and set aside the judgment and discharge the petitioner or...resentence the petitioner or grant a new trial or correct the sentence or make other disposition as may be appropriate." *Id.*

If the Minnesota Supreme Court chooses to limit the state district courts' otherwise broad authority to hear constitutional claims by imposing upon them the *Teague* standard, the Minnesota court may do so. The question presented here, however, is whether this Court has already imposed that limit upon the states and whether this court, or any federal court, could do so. *See Evans*, 114 P.3d at 449 ("Limiting a state statute on the basis of the federal court's caution [expressed in *Teague*] in interfering with State's self-governance would be, at least, peculiar."). The Court should grant the petition to answer this question.

Respondent argues that concerns about "uniformity" support the proposition that state courts must apply *Teague*. (S-BIO at 5-6). But such concerns have never animated this Court's discussions of state courts' authority to grant greater protections than those afforded by the federal constitution. Consider, as just one example, the question of whether a Sixth Amendment error under *Blakely v. Washington*, 542 U.S. 246 (2004), is automatically reversible structural error. In 2005, the Washington state supreme court held that it was. *State v. Hughes*, 110 P.3d 192 (Wash. 2005). This Court granted certiorari and reversed, holding that *Blakely* errors were not structural under *Sullivan v. Louisiana*, 508 U.S. 275, 279 (1993). *Washington v. Recuenco*, 126 S.Ct. 2546, 2553 (2006). The Court make clear, however, that Recuenco's "argument that, as a matter of state law, the *Blakely* * * * error was not harmless remains open to him on remand." *Recuenco*, 126 S.Ct. at 2551 n. 1 (emphasis original); *see also Id.* at 2554 (Stevens, J., dissenting) (agreeing with majority that "[t]he Washington Supreme Court can, of course, reinstate the same judgment on remand * * * [if] that court chooses, as a matter of state law, to adhere to its view that the proper remedy for *Blakely* errors * * * is automatic reversal of the unconstitutional portion of a defendant's sentence").

This Court gave the state of Washington permission to hold that criminal defendants in that state are entitled to something that criminal defendants in other states, let alone in federal court, are not entitled to – automatic reversal of the portion of their sentences that were imposed in violation of the federal constitution. If respondent's concerns about "uniformity" had any merit in this context, Washington state would not be free to hold that *Blakely* errors are structural in that state, and in that state only.

Respondent also cites *Horn v. Banks*, 536 U.S. 266, 271 (2002), in support of its position that *Teague* binds state courts. (S-BIO at 5). *Banks* holds nothing of the kind. In *Banks*, the Pennsylvania Supreme Court declined to engage in a *Teague* analysis and ruled on the merits of Banks' federal constitutional claim, raised in a post-conviction petition. *Commonwealth v. Banks*, 656 A.2d 467, 470 (Pa. 1995). Banks then filed a federal habeas petition and the Third Circuit held that it did not have to apply *Teague* because the state court had reached the merits of the issue. *Banks v. Horn*, 271 F.3d 527, 541-43 (3rd Cir. 2001). This Court reversed and held that federal courts must apply *Teague* where the state asserts it as a defense, even where the state courts reach the merits of a particular issue. *Banks*, 536 U.S. at 272. But the Court did not suggest that the Pennsylvania Supreme Court had erred by not applying *Teague*. *See Smart*, 146 P.3d at 25. If state courts were required to apply *Teague*, as the Minnesota Supreme Court held in this case, then the Pennsylvania Supreme Court would have erred by not doing so. Nothing in *Banks* suggests that this is true.

Finally, petitioner is not asking the Court to, in respondent's words, "grant broader federal constitutional rights to a defendant under state law." (S-BIO at 4) (citing *Arkansas v. Sullivan*, 532 U.S. 769, 772 (2001); *Oregon v. Hass*, 420 U.S. 714, 719 (1975)). In *Hass* and *Sullivan*, the state courts misapplied substantive provisions of the federal constitution and this Court, of course, is the final arbiter of such disputes. But nothing in those cases decides the issue present here – whether the state supreme court erred by concluding that it could not grant petitioner more protections than he would be afforded in federal court. *See Recuenco*, 126 S.Ct. at 2551 n. 1; *Brigham City, Utah v.*

Stuart, 126 S.Ct. 1943, 1950-51 (2006) (Stevens, J., concurring) (noting that where state courts misapply substantive portions of federal constitution, state may reach the same result by exercising its authority to grant broader protections to its citizens).

3. A decision from this Court may well afford petitioner the relief he seeks.

Respondent claims that, even if it felt that it had a choice in the matter, the Minnesota Supreme Court would still use the *Teague* standard. (S-BIO at 8). This proposition finds no support in the Minnesota Supreme Court's decision in this case. If the Minnesota court felt the way respondent believes it does, it would have been simple enough for the court to say so. *Cf. People v. Flowers*, 561 N.E.2d 674, 682 (Ill. 1990) (Illinois Supreme Court holds that *Teague* only applies to federal habeas corpus litigation but adopts *Teague* as a matter of state law); *Brewer v. State*, 444 N.W.2d 77, 81 (Iowa 1989) (same). But the Minnesota court said nothing of the kind. To the contrary, the court made clear that it felt it had no choice in the matter. *Danforth*, 718 N.W.2d at 456-57. The Minnesota Supreme Court has several times exercised its authority to grant greater protections to criminal defendants in Minnesota than such defendants would be afforded in federal court. *See, e.g., State v. Askerooth*, 681 N.W.2d 353, 359-63 (Minn. 2004) (declining to adopt holding of *Atwater v. City of Lago Vista*, 532 U.S. 318, 351 (2001)); *In re Welfare of E.D.J.*, 502 N.W.2d 779, 780-83 (Minn. 1993) (declining to adopt holding of *California v. Hodari D.*, 499 U.S. 621 (1991)). While this history is by no means a prediction of what the Minnesota court would do if freed of its understanding that it had to use *Teague*, it is indicative of a court that seriously considers granting

broader protections to its citizens. Respondent's conclusory claim, that the Minnesota Supreme Court would use *Teague* even it did not have to, is without merit.

4. The Court should grant certiorari to resolve the split of lower court authority on this important issue of first impression.

Respondent claims that "[e]xercise of this Court's discretionary jurisdiction would be more appropriate to resolve a federal question with broader impact among the state courts." (S-BIO at 8). It would be difficult to imagine such a question. The federal question presented here has been the subject of on-the-merits decisions by 15 state courts. Those courts have reached diametrically opposite conclusions on their authority to decide important federal constitutional issues. *Compare, e.g., State v. Forbes*, 119 P.3d 144, 148-49 (N.M. 2005) (deciding, as a matter of state law and equity, to apply holding of *Crawford* to a case that became final in 1987), *cert. denied*, 127 S.Ct. 1482 (U.S. March 5, 2007), *with Danforth*, 718 N.W.2d at 456-47 (holding that state supreme court "cannot apply state retroactivity principles when determining the retroactivity of a new rule of federal constitutional criminal procedure if the Supreme Court has already provided relevant federal principles").

If the supreme courts of Minnesota, Oregon, and Montana are right, then the appellate courts of Alaska, Florida, Montana, Nevada, Louisiana, Indiana, South Dakota, and New Mexico are wrong. New Mexico, for example, would have no authority to apply *Crawford*'s holding as it did in *Forbes*. *See Bockting*, 127 S.Ct. at 1183-84 (holding that, under *Teague*, *Crawford* does not apply to cases that became final before decision was announced). This Court should grant the petition for writ of certiorari,

resolve the split of authority, and confirm for the state courts their ability to apply federal constitutional rules to a broader class of criminal defendants than those who would be afforded relief in federal court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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